

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-7275
76-7275

**United States Court of Appeals
For the Second Circuit**

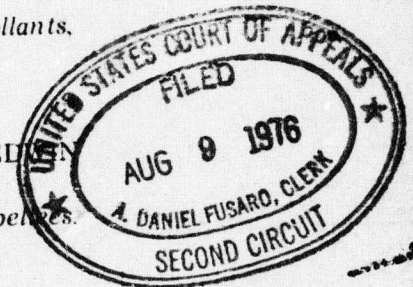
GILBERTO GERENA VALENTIN, JOSE ANTONIO APONTE
VAZQUEZ, JORGE B. FLORES RUIZ, CARLOS REYES
LOPEZ and JOSEPH MENDEZ RIVERA,

Appellants,

-against-

PAN AMERICAN WORLD AIRWAYS, INC. and EDWIN
GLASSER,

Appellees.



*On Appeal From The United States District Court
For The Eastern District Of New York*

APPELLANTS' BRIEF

LORENZO F. PADILLA
Attorney for Appellants
277 Broadway
New York, N.Y.
227-3410

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
SEPTEMBER TERM, 1976

NO. 76-7675

GILBERTO GERENA VALENTIN, JOSE
ANTONIO APONTE VAZQUEZ, JORGE B. FLORES
RUIZ, CARLOS REYES LOPEZ and JOSEPH
MENDEZ RIVERA,

Appellants,

-against-

PAN AMERICAN WORLD AIRWAYS, INC. and
EDWIN GLASSER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

OPINION BELOW

The record contains the opinion of the
Honorable Walter Bruchhausen, Senior District Court
Judge for the Eastern District of New York, denying
Appellants' Motion to set aside judgment.

ISSUE PRESENTED

I. Whether the District Court below had jurisdiction
over the subject matter of this action.

II. Whether this Court has duty to make a determina-
tion on the issue of subject matter jurisdiction.

STATEMENT

This action arises from an incident on board an aircraft of the Appellee, PAN AMERICAN. The Appellants had legally boarded Flight 296 in San Juan for passage from Puerto Rico to their home in New York. Without justification the Appellants were asked to leave and, after refusing, at the instigation of the Appellee, WILLIAM GLASSER, were arrested by Puerto Rican Authorities. They were subsequently exonerated and released and then at the instigation of the Appellees were again arrested, on this occasion by Federal Authorities. They again were exonerated and released. (A-5)

Appellant then commenced this action in May, 1973 in the Superior Court of Puerto Rico, San Juan Part against the Appellees, PAN AMERICAN WORLD AIRWAYS and EDWIN GLASSER. They sought recovery in the amount of \$1,500,000.00 for damages in the nature of false arrest, malicious prosecution and defamation. (A-5)

On June 23, 1973, the Appellees moved this action to the United States District Court for the District of Puerto Rico, under Title 28, U.S.C. 1441, asserting in its moving petition Federal Question Jurisdiction on the basis of Title 28, U.S.C. 1331(a) and Title 49, U.S.C. 1374(b). (A-18)

Appellees subsequently moved on July 6, 1973 for a change of venue to the Eastern District of New York, which motion was granted. The action then proceeded as of October 18, 1973 in the Eastern District of New York. (Docket Entry No. 1)

After numerous proceedings the action was set down for trial on December 16, 1974 before the Honorable Walter Bruchhausen, Senior District Court Judge. Appellants' attorney sought to inform the Court of his inability to attend on that date, but the papers were erroneously titled and filed as notice of entry. (Docket Entry No. 36).

On December 16, 1974 due to Appellants' attorney non-appearance, the Court held an inquest

and granted Appellees motion to dismiss plaintiff's complaint pursuant to Rule 41(b) of Federal Rules of Civil Procedure. (A-21)

Three days later, on the 19th day of December, judgment for the Appellees in the amount of \$14,291.25 and costs, together with the finding of facts and conclusions of law were entered and filed with the Court. (Docket Entry No. 39 and 40) Neither in the judgment, findings of fact or conclusions of law was there any determination on the issue of whether the Court had jurisdiction over the subject matter of this action. (A-51 and A- 54)

On December 10, 1975 Appellants' notice to be heard its Rule 60 motion to set aside the judgment, findings of facts and conclusions of law on the grounds of excusable neglect and fraud. (A-68) This motion was subsequently denied on December 19, 1975 (A-222) and the Appellant appealed. (A-223)

This appeal, at first, was only on the issues presented in the Rule 60 motion of excusable neglect and fraud. It was during the course of the appeal that counsel for Appellants first discovered the jurisdictional issue. (he had not earlier done so and he had not handled the action from its inception and had not been apprised of all the facts relating to the removal to the Federal Court). (Docket entry No.1)

Upon discovery of the jurisdictional question counsel for Appellants immediately sought an extension of time to file brief and joint appendix so as to present the jurisdictional challenge. (A-231). This motion was denied (A-247). Appellants then abandoned the appeal and the appeal was subsequently dismissed. (A-248). The Appellant abandoned the appeal so as to present his challenge in the District Court to the jurisdiction of the District Court over this action. This challenge was presented via a Rule 60(b)(4) motion to set aside the judgment as void.

This motion was made returnable on the 21st day of May, 1976. (A-249)

On the 21st, after oral argument, the Honorable Walter Bruchhausen, summarily denied Appellants motion without addressing himself to the jurisdictional question. (A-301) It is from this denial which was made without a determination of the jurisdictional issue that Appellant appeals.

SUMMARY OF ARGUMENT

In this action, there was no basis for removal to Federal District Court. The Appellants sought solely common law state remedy in false arrest, malicious prosecution, and defamation. This was not an action which could have been originally brought in Federal District Court under Title 28, U.S.C. 1331(a). Therefore, this Court had no basis for removal under Title 28, U.S.C. 1441. Therefore, the District Court had no jurisdiction over the subject matter of this action and the judgment

should thereby be declared void.

Secondly, the issue of jurisdiction over the subject matter of an action is so crucial that it necessitates a determination on that issue. Since the District Court has failed to make such a determination the duty to rule on the jurisdictional challenge now devolves to this Court.

POINT I

THE JURISDICTIONAL ISSUE PRESENTED IN
THIS APPEAL IS LEGALLY IDENTIFIED TO
THE UNITED STATES SUPREME COURT DECISION
OF NADER V. ALLEGHENY AND SAME SHOWS
LACK OF JURISDICTION HEREIN.

The Plaintiffs-Appellants herein respectfully present to this Court as authority for their position, asserted in Point II, the United States Supreme Court decision rendered June 7, 1976, entitled RALPH NADER, Petitioner v. Allegheny Airlines, Inc., Respondent. (Citation presently unknown to appellants).

The identity of both cases will be capsulized as follows:

1. In both cases the defendants are domestic airlines.
2. In both cases the plaintiffs are passengers seeking common law redress for wrongs perpetrated by the airlines.
3. In both cases pertinent statutes of the Federal Aviation Act affect the rights of the plaintiffs.
4. In both cases the defendants raised the

jurisdictional issue as to which is the appropriate body for determination of the rights of the parties.

5. In both cases plaintiffs were forced to resort the Circuit Court of Appeals for a determination of the jurisdictional issue.

The plaintiffs herein had commenced a common law action for redress in a state court in Puerto Rico. The plaintiffs sought redress for the common law torts of false imprisonment, false arrest and defamation. The complaint contained some language similar to the contents and provisions of Section 404(b) of the Federal Aviation Act of 1958 (Title 49, Section 1374(b), United States Code.) However, though there was this similarity of language the plaintiffs did not seek damages upon the statutes per se.

On this issue, the Supreme Court in the Nader case specifically states:

"His suit did not seek compensation for the bumping per se but asserted two other bases of liability; a common law action based on...

That is exactly what the plaintiffs had done in this action, i.e. seek compensation at common law with-

out reliance on the statutes.

Upon the commencement of this action, the defendants petitioned for removal to the federal district Court on the ground that by reciting discrimination in the language of the complaint, the federal court had acquired original jurisdiction over the action.

In the Nader case the defendants also petitioned for a removal from a Court on the jurisdictional ground that this forum was the inappropriate body to determine redress.

In this action the defendants moved upon the provisions of Section 404(b) just as the defendants did in the Nader case. The only distinction is that in Nader the defendants rely more on the provisions of sec. 411(b).

The plaintiffs herein would urge this Court to consider that although the statutes bear different numbers, the essence and thrust of the statutes are identical in that congress enacted both statutes for the protection of the public interest.

On the issue, the Supreme Court in the Nader case stated:

"The section is concerned not with punishment of wrongdoing or protection of injured competitors but rather with protection of the public interest. As such, Section 411 provides an injunctive remedy for vindication of the public interest to supplement compensatory common law remedies for private parties preserved by Section 1106. Thus a violation of Section 411 contrary to the Court of Appeals' conclusion, is not co-extensive with a breach of duty under the common law."

Likewise, the Appellant urges that violation of Section 404(b), (1374(b)), is not co-extensive with the common law rights of the plaintiff herein.

The United States Supreme Court went on to state:

"The Board had elected to establish boarding priorities and insure their passengers will be compensated for being bumped either by a liquidated sum under board regulations or by resort to a suit for compensatory damages at common law.

In sum Section 411 confers upon the Board a new and powerful weapon against unfair and deceptive practices that injure the public. But it does not represent the only, or best response to all challenge carriers actions that resulted in private wrongs."

Likewise as in this action the Federal District Court may have a new and powerful weapon between parties; but, as the Supreme Court held, it does not represent

the only, or best response, to all challenged carrier actions that result in private wrongs. The state Courts are courts which may represent the best response to a challenged carrier wrong.

On the issue of jurisdiction between the different bodies, the Supreme Court stated:

"The doctrine of primary jurisdiction is concerned with promoting proper relationships between the Court and administrative agencies charged with particular regulatory duties."

The Supreme Court gave as its reason for the doctrine of primary jurisdiction, that the agencies may be better equipped to handle certain matters by insight gained through experience and procedure.

In the instant action, there is no need for an expert determination as the issues are in false arrest, false imprisonment and defamation. As held in the Nader case:

"The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the Courts and the judgment of a technically expert body is not likely

to be helpful in the application of these standards to the facts of this case.

The appellants herein respectfully submit that the right to redress for the torts pleaded in the complaint are certainly within the conventional competence of a state court, and do not need the use of a federal court nor would the federal court, under the circumstances, be a court of original jurisdiction.

The appellant herein would also respectfully submit in support of his right to common law redress in the State Courts the holding by the United States Supreme Court in the Nader case:

"Section 1106 of the Act, Title 49 U.S.C. Section 1506 provides that nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

This holding interpreting section 1106 not only applies to the statute in issue in the Nader case, section 411 but also to the statute in issue in the instant action, section 404(b), (1374(b)).

The appellant would also respectfully direct the Court's attention to the concurring opinion of Mr. Justice White, wherein he states:

"Neither an order denying or granting relief under that section would foreclose claims based on State law; and there is not present here the additional consideration that a Section 411 proceeding would be helpful in resolving or affecting in some manner, the State law claim for compensatory or punitive damages.

The appellant herein would offer and submit to this Court the very same language of Mr. Justice White inserting therein only section 404(b) for section 411 to arrive at the same decision rendered in the Nader case.

The removal petition provided surety in the amount of \$250.00 should it be determined that the action was not removable or was improperly removed. There has not been any determination on the issue of removal in the Court below and this issue is crucial to the issue of whether the Court had jurisdiction over the action.

Upon the Nader case, the appellant submits that the action was not removable because the state court was a court of conventional competence and capable of disposing of the matter. The removal was improper because the District Court was not a Court with original jurisdiction over the action which asserted false arrest, false imprisonment and defamation solely.

Under Section 1106, (1506), the Federal Aviation Act does nothing to abridge or alter common law remedies. The appellants in this action asserted remedies clearly existing at common law. They were recognized state actions and were properly asserted in the state forum.

Therefore, under the Nader interpretation of Section 1106 (1506), the removal of this action to the federal District Court under Section 404(b) was an abridgment and alteration of a remedy existing at common law. It was, therefore, in all respects improper as the Court lacked jurisdiction.

POINT II

THE JUDGMENT SHOULD BE SET ASIDE
BECAUSE THIS COURT LACKS SUBJECT
MATTER JURISDICTION SINCE THERE
WAS NO FEDERAL CLAIM WHATSOEVER
ASSERTED IN PLAINTIFFS' COMPLAINT.

This case came initially to the Federal Court through a petition for removal. The case was removed from the Superior Court of Puerto Rico to the Federal District Court for the District of Puerto Rico and later transferred to the District Court for the Eastern District of New York.

The basis for removal under Title 18, United States Code, Section 1441 was an asserted original Federal jurisdiction of this case under Title 18, United States Code, Section 1331 and Title 49, United States Code, 1374. Admittedly, if the Court would have had original jurisdiction under these two Statutes, the removal would have been proper and no challenge to it would be possible at this time.

However, the appellant now challenges this

removal because the Court had no removal jurisdiction since this is not a case which a District Court would have had original jurisdiction over, i.e., this Court has no subject matter jurisdiction.

The removal Statute, Title 28, United States Code, Section 1441 (a) states:

"Any Civil Action brought in a state court of which the District Courts of the United States have original jurisdiction may be removed by the defendants to the District Court of the United States for the District... where such action is pending."

The pertinent phrase here is "of which the District Courts of the United States have original jurisdiction."

There are two basis of such original jurisdiction:

Diversity jurisdiction and Federal question jurisdiction.

Here, diversity jurisdiction is not applicable since the plaintiffs and defendants are New York residents.

(also the defendants did not even raise such jurisdictional basis). The basis for jurisdiction, therefore, must be under Federal question jurisdiction. The pertinent Statute herein, Title 28, United States Code, Section 1331 (a) states:

"The District Courts shall have original jurisdiction of all Civil actions wherein the matter in controversy exceeds the sum or value of \$10,000.00, exclusive of interest and costs and arises under the Constitution, Laws or Treaties of the United States."

Since the action admittedly exceeds \$10,000.00, the question of whether this Court has subject matter jurisdiction over this action depends on whether the matter in controversy "arises under the Constitution, Laws or Treaties of the United States."

This presents two issues for determination. First, when did the case arise under the Constitution, Laws or Treaties of the United States and second, what evidence is used to ascertain whether a case does arise under the Constitution, Laws or Treaties of the United States.

The Courts on numerous occasions have made such determinations and the Law seems to be fairly clear.

The Supreme Court has stated:

"A case may be truly said to arise under the Constitution or Laws of the United States whenever its correct decision depends on the construction of either." Cohens v. Virginia, 19 US 264 (1821); Tennessee v. Davis, 100 US 257 (1880); Macon Grocery Company v. Atlantic Coastline Railroad Company, 215 US 501 (1910).

"There must be a real and substantial dispute as to the effect or construction of the Constitution or some Law upon the determination of which the dispute depends." McCain v. Des Moines, 174 US 168 (1899); United Public Workers v. Mitchell, 330 US 75 (1947).

"For jurisdiction the suit must have been one in which some right would be defeated or sustained by construction of the Constitution, Laws or Treaties of the United States." New Orleans, Mobile and Texas Railroad Company v. Mississippi, 102 US 135 (1880); Gully v. First National Bank, 299 US 109 (1936); Bell v. Hood, 327 US 678 (1946).

Two New York District Court cases also clarify the Law on this subject. In Smith v. Barnett, 242 Fed. 83, 1917, DC New York, the Court states that "plaintiff must have claimed the right under the Federal Constitution or Laws and sought to enforce it before an action became subject to Federal jurisdiction."

In Nelson v. Laiden, 82 F Supp. 661, 1949, DC NY, the Court stated that "a genuine and present controversy must exist as to the construction or interpretation of the Constitution or of a Statute of the United States" for there to be Federal jurisdiction.

On the first point, therefore, the law is clear that for a case to "arise under the Constitution, Laws or Treaties of the United States" there must be a Federal right asserted in the law suit with said right being an essential element of the law suit. As will be later demonstrated, this did not occur in the case at bar.

On the second point, the Courts again have been straightforward and consistent.

In Chappel v. Waterworth (155 US 102, 1894), the Supreme Court stated:

"A case could not be removed to Federal Court as one arising under the Constitution, Laws or Treaties of the United States, unless that (issue) appeared from plaintiff's statement of his own claim; if it did not appear, the want could not be supplied in the petition for removal or in a subsequent pleading."

Other cases have followed this Ruling:

"That claim arose under Constitution or Laws of the United States had to appear from plaintiff's statement of his claim." *Spencer v. Duplan Silk Company*, 191 US 526 (1903); *Minnesota v. Northern Securities Company*, 194 US 48 (1904); *Louisville and Nashville Railroad Company v. Mottley*, 211 US 149.

"Jurisdiction of Federal District Court was determined by allegations of the complaint." *Moore v. Chesapeake & Ohio Railway Company*, 291 US 205 (1934).

"Allegations of complaint controlled question of jurisdiction." *Hillsboro v. Cromwell*, 326 US 620 (1946).

Therefore, on second point it is obvious that the Federal Claim "arising under Constitution, Laws or Treaties of the United States" which is an essential element of the law suit must be asserted in the complaint itself.

On point is the case of *Stauf v. Schweizerisch Krevitanstalt* (45 F Supp.449, 1942, DC New York). Here the Court stated: "controversy with respect to the Federal rights must be disclosed upon the face of the complaint unaided by answer or by the petition for removal."

In summary, the Rules are that for Federal jurisdiction to exist there must be a claim asserted which depends on Federal Law and this claim must be asserted in the complaint.

Applying these Rules to the instant case, one finds that the criteria for Federal jurisdiction are not met. Nowhere in the complaint has the plaintiff alleged any right flowing from a Federal Statute. The suit is based on malicious prosecution, false arrest and defamation of character. These are all state created actions and have no connection with any Federal right. Furthermore, although there were Federal officers involved in that they arrested the plaintiffs, there is no allegations against these

Federal Agents. Also of note, is that it is defendants' petition which first asserts any Federal Statute. In their petition, the defendants allege that plaintiffs' cause of action depends upon Title 49, United States Code, Section 1374 (b). But there is no mention in plaintiffs' complaint of this Statute. There is no assertion that they based their claim under this Statute. Defendants sole evidence for their contention of a Federal claim is that the plaintiffs in their complaint, at one point stated that defendants were discriminating against them and depriving them of their rights. So the circumstances of this so-called assertion of discrimination and deprivation of rights by the plaintiffs deserve examination for a determination whether this is an assertion of a Federal right. The circumstances are that in Paragraph "9" of the complaint plaintiffs' state that at the time when the original incident took place they told the defendant, EDWIN GLASSER,

that he was prejudiced against the plaintiffs and further, that in Paragraph "12" plaintiffs state that again at time of the original incident, they argued that their Civil rights were being violated. These two paragraphs are not assertions of Federal claim, rather, they are simply statements of what plaintiffs stated to the defendant at time of the original incident aboard the aircraft. The defendants are seeking to show Federal jurisdiction not by any allegations made by the plaintiffs, but by the fact that in their complaint, they mention what transpired during the incident on the aircraft. If defendants' contention were upheld, this would result in a truly curious situation. The plaintiffs would be held to have asserted a Federal claim which could be the basis of Federal jurisdiction prior to the beginning of a lawsuit. The fact that plaintiffs included in their complaint their statements made to the defendant at the time of the original incident, should not be the cause for a decision upholding Federal jurisdiction.

As stated in the case of Standage Ventures, Inc. v. Arizona, (499 F 2nd 248, 1974, CA 9 Arizona)::

"To entitle party to remove a case from State Court to Federal District Court, under Title 28, United States Code, Section 1441(b) on grounds that action arises under Laws of the United States, complaint must expressly allege Law of the United States that is directly or indirectly involved in the dispute."

Since plaintiff did not so expressly allege any Federal claim arising from the Federal Law, there was no Federal question jurisdiction, under Title 28, United States Code, Section 1441(b). Without such jurisdiction the removal to the Federal District Court, in all respects, was improper. This means that all the proceedings held in the Federal District Court are null and void. Therefore, the Court had no power to make the judgment of December 19, 1974 and said judgment must be declared void.

It is of crucial importance that in neither the judgment nor the Findings of Fact nor Conclusions of Law of December 19, 1974, was there any finding as

to the Court's subject matter jurisdiction over this action. Due to this, the issue of the Court's jurisdiction over this matter is still open. It is up to this Court, at this time, pursuant to this Rule 60b(4) motion to now review the circumstances surrounding the removal of this case to the Federal District Court. If as stated herein the Court finds that there was no subject matter jurisdiction, then the relief herein sought to set aside the judgment as void should be granted. To allow the plaintiffs a remedy due to the improper removal had in this action, plaintiffs should also be given leave to seek redress in the State Court.

POINT III

THIS COURT HAS AN AFFIRMATIVE DUTY
TO MAKE A DETERMINATION ON THE ISSUE
OF WHETHER THE FEDERAL DISTRICT COURT
HAD JURISDICTION OVER THE SUBJECT
MATTER OF THIS ACTION.

The District Courts of the United States are courts of limited jurisdiction. "They are empowered to hear only those cases (1) that are within the judicial power of the United States as defined in the Constitution and (2) that it is entrusted to them by a jurisdictional grant by the Congress." (Jorden v. Metropolitan Utilities Dist., C.A. 8th, 498 F.2d 514, 1974; Wright, Miller and Cooper, Federal Practice & Procedure, Jurisdiction Section 3522, Vol.13 p.44.)

The Federal Courts, therefore, are unlike the State Courts, limited in jurisdiction to those cases "defined by the Constitution" and "entrusted to them by the Congress". As to those cases not so "defined" or "entrusted" they have absolutely no

jurisdiction or power.

Further Federal cases have placed even stricter restrictions on Federal jurisdiction. As stated in Healy v. Ratta (292 U.S. 263, 270, 54 S.Ct. 700, 703) and reiterated in Victory Carriers, Inc. v. Law (404 U.S. 202, 1971, 92 S.Ct. 418)

"Due regard for the rightful independence of State Governments, which should actuate Federal Courts, requires that these courts scrupulously confined their own jurisdiction to the precise limits that a Federal statute has defined."

As a result of the rules so often followed in the Federal Courts there is a presumption that a Federal Court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists. (Lehigh Mining and Manufacturing Co. v. Kelly, 16 S.Ct. 307, 160 U.S. 327; Means v. Wilson, D.C.S.D., 383 F.Supp. 378, 1974) There is, therefore, in every case a need for a demonstration that the Court has subject matter jurisdiction.

This demonstration must be made by the parties seeking to invoke said jurisdiction. (Thomson v. Gashill, 62 S.Ct. 673, 315 U.S. 442, 1942; Gibbs v. Bush, 59 S.Ct. 725, 307 U.S. 66, 1939)

This demonstration is usually done by the plaintiff, (asserting party) in his complaint on an assertion of jurisdictional facts. Said allegations usually suffice as a demonstration of jurisdiction unless a challenge either by motion of the defendant or by Court sua sponte is made.

When that challenge is made Court is duty bound to cause a demonstration of the Court subject matter jurisdiction and to make a determination on that issue.

In the case at bar said demonstration and determination were never made.

No demonstration was made in the complaint and plaintiff did not assert any jurisdictional facts.

No demonstration could be made in the petition

for removal as it is the complaint which governs said issues.

No demonstration or determination was made by the District Court in its judgment, findings of facts or conclusions of law of December 19, 1974.

No demonstration or determination was made in the Court's denial of plaintiff's motion to set aside the judgment pursuant to Rule 60(b)(1) and (3), Federal Rules of Civil Procedure, for excusable neglect and fraud.

No demonstration or determination was made in the Court of Appeals as the appeal was abandoned prior to the framing of the jurisdictional issue.

Finally, and most importantly, no demonstration or determination of the jurisdictional issue was made in the Court's summarily denying plaintiff's rule 16(b)(4) motion to set aside the judgment as void.

It was at this juncture that the District Court had an affirmative duty to cause a demonstration

of Federal jurisdiction and to make a determination of the jurisdictional issue. The Court refused and failed to do so. The Court had, according to the rules already enunciated, the duty to evoke a demonstration by the asserting party herein, the Appellee, that the Court had subject matter jurisdiction over the action.

Wherein if the Appellee could make such demonstration the Court would find that it had jurisdiction over this action and that the judgment would thereby stand; but, if the Appellee could not make such demonstration, the Court would find that it had no jurisdiction over this action and that thereby the judgment and all the proceedings had therein were void.

By the Appellants presentation of the jurisdictional challenge the Court has a clear and affirmative duty to make a determination on the jurisdictional issue. Failure to do so was, thereby, error. That

affirmative duty to make a jurisdictional determination now devolves upon this Court.

As the Supreme Court states in Mitchell v. Maurer (55 S.Ct.162,165;293 U.S. 237, 244, 1934)

"An Appellate Federal Court must satisfy itself not only of its own jurisdiction, but also of that of the Lower Court in a cause under review."

Therefore, this Court must now make determination on the issue of jurisdiction. For without such determination the Court would be acting in an improper manner in unconstitutionally invading the powers reserved for the States by the Constitution in entertaining a case not found to be within their jurisdiction.(ibid. Victory Carriers, Inc. v. Law) and in unconstitutionally binding the plaintiff to a judgment which the Court had no power to render. (U. S. Constitution, Fifth Amendment, Due Process Clause.)

CONCLUSION

This Court has an affirmative duty to

examine the issue of whether the Court below had jurisdiction over this action and make a determination upon same; and that this determination, should be that the Federal District Court lacks jurisdiction over the subject matter of this action and that therefore the judgment and all other proceedings had herein are null and void.

Respectfully Submitted,

LORENZO F. PADILLA
Attorney for Appellants

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----x
GILBERTO GERENA VALENTIN, etal,

Plaintiffs-
Appellants,

-against-

DOCKET #76-7275

PAN AMERICAN WORLD AIRWAYS, INC.,
and EDWIN GLASSER,

AFFIDAVIT OF SERVICE

Defendants-
Appellees.

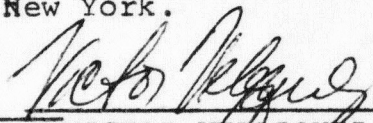
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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

VICTOR VELAZQUEZ, being duly sworn, deposes and says:

1. That deponent is not a party to the action, is over 18 years of age and resides at 1151 East 214th Street.

2. That on the 9th day of August, 1976 deponent served one copy of the Joint Appendix and two copies of Appellant's Brief upon HAIGHT, GARDNER, POOR & HAVENS, ESQS. , Attorneys for the Defendants-Appellees in this action, at their office located at One State Street Plaza , New York, New York 10004, the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.


VICTOR VELAZQUEZ

SWORN TO BEFORE ME THIS

9th DAY OF AUGUST, 1976.



TIMOTHY M. TAYLOR
NOTARY PUBLIC, State of New York
No. 9296900
Qualified in Westchester County
Commission Expires March 30, 1978

NOTICE OF ENTRY

Sir:- Please take notice that the within is a (certified)
true copy of a
duly entered in the office of the clerk of the within
named court on 19

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir: - Please take notice that an order

of which the within is a true copy will be presented
for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

Index No.

76-7275

Year 1976

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

GILBERTO GIERENA VALENTIN,
et al,
PLAINTIFFS,

- AGAINST -

PAN AMERICAN WORLD AIRWAYS, INC.,
AND EDWIN GLASSER
Respondents.

AFFIDAVIT of Service

Attorney for

Office and Post Office Address, Telephone

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within
found to be a true and complete copy. has been compared by the undersigned with the original and

Dated:

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is
the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein
stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent
further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF

ss.:

INDIVIDUAL VERIFICATION

deponent is the , being duly sworn, deposes and says that
read the foregoing in the within action; that deponent has
the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and
belief, and that as to those matters deponent believes it to be true. and knows the contents thereof; that

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF

ss.:

CORPORATE VERIFICATION

of , being duly sworn, deposes and says that deponent is the
named in the within action; that deponent has read the foregoing the corporation
and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein
stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because
is a corporation. Deponent is an officer thereof, to-wit, its

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this

day of

19